Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TERESA A. O'CONNOR, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C03-3081-MWB **ORDER REGARDING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND DEFENDANT'S OBJECTIONS TO REPORT AND RECOMMENDATION**

I. INTRODUCTION

The plaintiff Teresa A. O'Connor ("O'Connor") seeks judicial review of the final decision of the Commissioner of Social Security denying her applications for Title XVI supplemental security income ("SSI") and Title II disability insurance benefits. This matter was referred to United States Magistrate Judge Paul A. Zoss. Judge Zoss recommended judgment be entered in favor of O'Connor and against the Commissioner. *See* Report and Recommendation, Doc. No. 16.

II. BACKGROUND

O'Connor filed her application for SSI benefits on June 17, 1999. (R. at 18). She filed her application for DI benefits on June 23, 1999. (R. at 67-69). She alleges she is unable to work at the substantial gainful activity ("SGA") level due to a combination of back pain, manic depressive illness, multiple personalities, seizures and mini strokes which

limit her both physically and mentally. (R. at 57). Both applications were denied on September 1, 1999. (R. at 48-53), and denied again upon reconsideration, on May 9, 2000. (R. at 56). On July 3, 2000, O'Connor filed a timely request for hearing before an ALJ. (R. at 61). A hearing was held on June 22, 2001. (R. at 493-537). On September 14, 2001, O'Connor's claims were denied by the ALJ. (R. at 15-28). O'Connor filed a request for review by the Appeals Council. On July 18, 2003, the Appeals Council denied O'Connor's request for review, making the ALJ's decision the final decision of the Commissioner. (R. at 9-12).

O'Connor filed a timely request for review in this court on September 22, 2003. O'Connor filed a brief supporting her claim on January 26, 2004. (Doc. No. 8). On March 17, 2004, the Commissioner filed a motion to remand the case pursuant to sentence four of 42 U.S.C. § 405(g). (Doc. No. 9). On March 23, 2004, the Commissioner filed an unopposed motion to extend the deadline for her response brief until after the court had ruled on the motion for remand. (Doc. at 10). Judge Zoss denied the motion for remand pursuant to sentence four finding a sentence four remand requires a plenary review of the record. (Doc. No. 11). The Commissioner filed her response brief on April 1, 2004. (Doc. No. 12). On April 6, 2004, O'Connor filed a reply. (Doc. at 13). On April 15, 2004, the Commissioner filed a response to O'Connor's reply. (Doc. at 14). On August 20, 2004, United States Magistrate Judge Zoss filed his Report and Recommendation. (Doc. at 16). On September 7, 2004, the Commissioner filed a motion for leave to file late response and objections to the Report and Recommendation. (Doc. No. 17). On September 15, 2004 the Commissioner's objections were deemed timely filed by this court. (Doc. No. 18). On September 17, 2004, O'Connor filed a resistence to the Commissioner's objections. (Doc. No. 20). The court has received no additional reply and finds the matter is now fully submitted for consideration.

III. LEGAL ANALYSIS

A. Standards of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing 28 U.S.C. § 636(b)(1)); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)). The Commissioner has made specific, timely objections in this case. Therefore, *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made" is required here. *See* 28 U.S.C. § 636(b)(1).

The standard of judicial review for cases involving the denial of social security benefits is based on 42 U.S.C. § 405(g), which provides that "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." This standard of review was explained by the Eighth Circuit Court of Appeals as follows:

> Our standard of review is narrow. "We will affirm the ALJ's findings if supported by substantial evidence on the record as a whole." *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir.

> 1998). "Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support a decision." *Id*. If, after reviewing the record, the Court finds that it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, the court must affirm the Commissioner's decision.

See Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000).

The Eighth Circuit Court of Appeals also has explained, "In reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ's decision." *Hutsell v. Massanari*, 259 F.3d 707, 714 (8th Cir. 2001) (quoting *Easter v. Bowen*, 867 F.2d 1128, 1131 (8th Cir. 1989)); *Howard v. Massanari*, 255 F.3d 577, 581 (8th Cir. 2001) ("In assessing the substantiality of the evidence, we must consider evidence that detracts from the Commissioner's decision as well as evidence that supports it.") (quoting *Black v. Apfel*, 143 F.3d 383, 385 (8th Cir. 1998), with internal quotations and citations omitted). In reviewing the record for substantial evidence, the court may not make its own findings of fact by reweighing the evidence and substituting its own judgment for that of the Commissioner. *Benskin v. Bowen*, 830 F.2d 878, 882 (8th Cir.1987). Weighing the evidence is a function of the ALJ, who is the "statutory" fact-finder. *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003). Instead, the court must simply determine whether the quantity and quality of evidence is enough so that a reasonable mind might find it adequate to support the ALJ's conclusion. *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994). In addition, the court must also review the Commissioner's decision and decide whether the Commissioner applied the proper legal standard. *Olson v. Apfel*, 170 F.3d 820, 822 (8th Cir. 1999); *Boock v. Shalala*, 48 F.3d 348, 351 n. 2 (8th Cir. 1995). Reversal is appropriate not only for lack of substantial evidence, but also for cases in which the

Commissioner applies the wrong legal standards. Accordingly, in reviewing the record in this case, the court must not only determine whether substantial evidence on the record as a whole supports the ALJ's decision but whether the proper legal standards were applied.

B. The Commissioner's Objections

The Commissioner objects to Judge Zoss's conclusion that, although, the ALJ erred in how he determined the residual functional capacity ("RFC") of the claimant and failed to consider all of the relevant evidence, and failed to support his credibility determination with a proper, full evaluation; there was substantial evidence in the record as a whole to support a finding that O'Connor was disabled. The Commissioner admits that the ALJ failed to discuss the weight given to the opinions of L.J. Grobler, M.D. and Tonya Petersen-Anderson, a nurse practitioner. The Commissioner asserts, however, that the appropriate remedy is to remand this case and allow the ALJ to properly apply the regulations and explain the weight he gave to medial opinion evidence. The Commissioner argues Judge Zoss improperly weighed the evidence which, the Commissioner argues, is the ALJ's function as the factfinder.

C. Discussion

As stated above, a district court's standard of review is narrow and the court will affirm an ALJ's findings if the findings are supported by substantial evidence on the record as a whole. *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). Further, in reviewing the record for substantial evidence, the court may not make its own findings of fact by reweighing the evidence and substituting its own judgment for that of the Commissioner. The court will now address the Commissioner's objections.

1. Treatment of Medical Opinion Evidence Under the Regulations

a. Dr. Grobler

The Commissioner contends that, contrary to Judge Zoss's Report and Recommendation, this case should be remanded because the ALJ failed to properly evaluate medical opinion evidence. The Commissioner argues that the ALJ applied incorrect legal standards and acknowledges that the ALJ erred in applying the wrong legal standards to the opinions of two physical therapists. The Commissioner argues that the ALJ erred in not recognizing that the physical therapists' opinions were signed by L.J. Grobler, M.D., a medical specialist. The court notes that Dr. Grobler's name does not appear anywhere in the ALJ's decision. The Commissioner contends that the proper remedy for the ALJ's failure to apply the correct standard to medical opinion evidence is to remand this case so the ALJ can properly apply the regulations to the evidence and discuss the weight to be given to Dr. Grobler's opinion. O'Connor asserted and Judge Zoss concluded in his Report and Recommendation that the court could still consider and give weight to Dr. Grobler's opinion because it was not inconsistent with the other evidence in the record and that weight could be given to his opinion because he was a specialist. O'Connor and Judge Zoss contend that the court can find that there is substantial evidence on the record as a whole to support a finding of disability.

The Social Security regulations contain detailed instructions regarding how to evaluate medical evidence, including medical opinions. *See* 20 C.F.R. §§404.1527, 416.927. "Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of [the claimant's] impairment(s), including . . . symptoms, diagnosis and prognosis, what [the claimant] can still do despite impairment(s), and . . . physical or mental restrictions." 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). Generally, more weight is given to treating sources, "since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [the claimant's] medical impairment(s)." 20

C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). An ALJ is to evaluate medical opinion evidence by applying the proper regulation to determine how much weight it should be afforded, including: the length of the treatment relationship and the frequency of examination; the nature and extent of the treatment relationship; the supporting evidence underlying the opinion; the opinion's consistency with the record as a whole; and whether the opinion is offered by a specialist in the relevant field. 20 C.F.R. § 404.1527.

Opinions by non-treating health care providers are also to be evaluated, regardless of the source. *See* 20 C.F.R. §§ 404.1527(d), 416.927(d). The weight to be given consultative evaluations and opinions is determined using the same factors as used for treating physician opinions. *Id.* Finally, "the Commissioner is encouraged to give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist." *Singh v. Apfel*, 222 F.3d 448, 452 (8th Cir. 2000) (*citing Metz v. Shalala*, 49 F.3d 374, 377 (8th Cir.1995)); *see also* 20 C.F.R. §§ 404.1527(d)(5), 416.927(d)(5).

In the Report and Recommendation, Judge Zoss stated:

> The ALJ discounted these findings because, in the ALJ's view, they represented the opinion of a physical therapist, and because the ALJ found the findings to be inconsistent with the record as a whole. (See R. 24). The ALJ failed to take note of the fact that the evaluation report was signed not by the physical therapists who performed some of the testing, but by orthopedic surgeon Leon J. Grobler, M.D., and by vocational consultant Donna Chandler. The court finds the ALJ failed properly to reconcile the functional limitations found by the staff at the Spine Diagnostic and Treatment Center at the University of Iowa with his own, differing, opinion as to O'Connor's RFC.

Report and Recommendation, Doc. No. 16 at 42. The ALJ is required to evaluate every

medical opinion he receives. 20 C.F.R. § 404.1527(d). Additionally, when considering whether the ALJ properly denied Social Security benefits, the court must determine whether the decision is based on legal error, and whether the findings of fact are supported by substantial evidence on the record as a whole. *Clark v. Chater*, 75 F.3d 414, 416 (8th Cir. 1996). Judge Zoss stated, "In summary, the court finds the ALJ erred in his RFC determination, failed to consider all of the relevant evidence, and failed to support his credibility determination with a proper, full evaluation pursuant to *Polaski*." Report and Recommendation, Doc. No. 16 at 43. This court agrees with the Commissioner that Judge Zoss undertook an analysis of the evidence that is statutorily assigned to the ALJ. The court must simply determine whether the quantity and quality of evidence is enough so that a reasonable mind might find it adequate to support the ALJ's conclusion, it is not for the court to assign weight to evidence that was not properly considered by the ALJ. When an ALJ fails to apply the proper regulation to medical opinion evidence this impacts the ALJ's determination of a claimant's RFC and the RFC determination becomes flawed. The ALJ must properly evaluate the evidence and determine the claimant's RFC only after considering the entire record.

In this case, the ALJ found that O'Connor was not disabled but this finding was based on a flawed RFC because an incorrect legal standard was used to weigh medical opinion evidence. Consequently, the court finds that the ALJ did not to address the fact that Dr. Grobler, a physician and a specialist, signed the letter explaining the opinions of the therapists and the ALJ's reason for discounting the opinions of the therapists was based on an incorrect legal standard. The ALJ erred when he failed to address the fact that Dr. Grobler, a physician, was involved with the examination of O'Connor conducted by the physical therapists, and that he signed the letter explaining the results of that examination. The ALJ failed to properly apply the regulations.

O'Connor wants this court to conclude, regardless of the ALJ's error, that there is substantial evidence contradicting the Commissioner's decision and that the court can find that there is substantial evidence on the record as a whole that supports a finding of disability. However, that would require this court to assign weight to the evidence not properly considered by the ALJ. This court cannot determine whether the ALJ would have reached the same decision, to deny benefits, if the proper regulation would have been applied. Thus, the court cannot conclude that the legal error was harmless and that there is or is not substantial evidence on the record to support the ALJ's decision. Further, the ALJ failed to provide any discussion as to why the opinions of the therapists were inconsistent with the record as a whole.

As stated above, under the statutory scheme, the factfinding role in Social Security disability benefit cases is assigned to the ALJ. The reviewing court is to insure that the ALJ's decision is supported by substantial evidence and also to make certain that the ALJ applies the correct regulation. When the ALJ has not properly applied the regulations the court should not assume the role of the ALJ but demand that the ALJ properly apply the regulations. Therefore, as to this issue, the Commissioner's objection is sustained.

b. Ms. Petersen-Anderson

The Commissioner asserts a similar objection as to the ALJ's consideration of Ms. Petersen-Anderson's opinion. The court agrees with Judge Zoss that the ALJ "failed to discuss at all the RFC opinions of Ms. Petersen-Anderson, who had been treating O'Connor regularly for a number of years." Report and Recommendation, Doc. No. 16 at 42.

The ALJ included a one paragraph description of Ms. Petersen-Anderson's relationship with O'Connor:

> Nurse practitioner Tonja Petersen-Anderson examined the

> claimant on numerous occasions. On October 7, 1999, when the claimant returned for treatment because of continued right leg pain, she was using a cane. In progress notes dated October 12, 1999, the claimant reported that she had improved after seeing a chiropractor, and the nurse practitioner noted that the claimant was not using a cane or wheelchair. (Exhibit 27F, ppg. 1-3)

(R. at 21). The ALJ failed to provide any explanation as to why he gave no weight to Ms. Petersen-Anderson's opinions even though she worked for the Trimark Physicians Group and her opinions appeared as part of Dr. James P. Slattery's medical reports. (R. at 417-420). The applicable regulations expressly state that after considering evidence from "acceptable" medical sources for purposes of establishing an impairment, evaluators "may also use evidence from other sources [such as therapists] to show the severity of your impairment(s) and how it affects your ability to work . . ." 20 C.F.R. §§ 404.1513, 416.913. The Eighth Circuit Court of Appeals made it clear in *Shontos v. Barnhart*, 328 F.3d 418, 426 (8th Cir. 2003), the ALJ is not free to disregard the opinions of health care professionals simply because they are not medical doctors. This is consistent with the federal regulations on the matter; 20 C.F.R. § 404.1513(a) lists nurse practitioners and therapists as medical sources who can provide opinions as to an applicant's level of disability.[1] In *Shontos* the Eighth Circuit Court of Appeals stated,

> The amount of weight given to a medical opinion is to be governed by a number of factors including the examining relationship, the treatment relationship, consistency, specialization, and other factors. Generally, more weight is given to opinions of sources who have treated a claimant, and to those who are treating sources.

Shontos, 328 F.3d at 426. The ALJ failed to discuss at all the RFC opinions of Ms.

[1] Ms. Anderson is a licensed Advanced Registered Nurse Practitioner (ARNP).

Petersen-Anderson and provided no explanation as to why he did not consider Ms. Petersen-Anderson's opinions. Although the ALJ did include some of the limitations found by Ms. Petersen-Anderson in the final hypothetical question asked of the vocational expert, there was no discussion as to why those limitations were not included in O'Connor's RFC in the ALJ's opinion. The ALJ failed to apply the legal standards set by regulations and the courts. Again, this court will not engage in a guessing game as to the weight given to Ms. Petersen-Anderson's opinions or the reasoning behind the ALJ's failure to include the limitations provided in the medical opinion of a health care professional who had a treating relationship with O'Connor. It is the function of the ALJ to apply the proper legal standard and to weigh the evidence. Further, it is the responsibility of the ALJ to articulate the reasons why either no weight was given or great weight was given to the evidence. Again, the ALJ failed to do this. Therefore, as to this issue, the Commissioner's objection is sustained.

2. Credibility Analysis

The Commissioner objects to Judge Zoss's finding that the ALJ did not properly weigh the credibility of O'Connor's subjective complaints of pain. O'Connor urges the court to reverse and remand for an immediate award of benefits. However, this is appropriate relief when additional fact finding would serve no useful purpose. A remand is more appropriate when the administrative record has not been fully developed, or where the ALJ makes minimal findings that are not supported by an adequate evaluation of the evidence on the record. Here, the ALJ did not adequately evaluate evidence because he failed to apply the correct legal standards. Further, in evaluating credibility and determining disability, the court finds the ALJ did not employ the requisite *Polaski* analysis. *See Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984) (finding an adjudicator must give full consideration to all of the evidence presented including

examining physicians). In fact, as observed by Judge Zoss in his Report and Recommendation, "not even a perfunctory listing of the *Polaski* factors are included in the ALJ's opinion." Consequently, in this case, the ALJ failed to provide explanations that were adequate enough for the court to a conduct meaningful review. The ALJ failed to properly follow the regulations, ignored inconsistencies in the record, and failed to conduct a proper analysis. Therefore, as to this issue, the Commissioner's objection is overruled. The court agrees with Judge Zoss that the ALJ failed to conduct a proper credibility analysis as required by *Polaski*.

3. Substantial Evidence

The court must review the ALJ's decision to determine whether the ALJ applied the correct legal standard, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003). Substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002). Contrary to O'Connor's argument, this court can not consider the record in its entirety when the ALJ has not properly considered the record in its entirety. The court cannot give the evidence appropriate weight when the evidence has not been given weight by the ALJ in accordance with the regulations. The court finds that the ALJ failed to adequately set forth a clear and satisfactory explanation of the basis for his decision in accordance with the appropriate legal standards. In this case, a remand is appropriate so the Commissioner can give the evidence proper consideration. The court cannot undertake an analysis of the case, picking and choosing between conflicting evidence and giving weight to some evidence over others when the ALJ has failed to properly do so. Such action would improperly transform the role of the reviewing court

into that of a factfinder. Therefore, at this time, the court cannot conclude that the ALJ's decision is or is not supported by substantial evidence on the record as a whole.

IV. CONCLUSION

Upon *de novo* determination of those portions of the Report and Recommendation, or specified proposed findings or recommendations to which the Commissioner has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that the Commissioner's objections are sustained in part and overruled in part. The Report and Recommendation concerning disposition of this matter is rejected. §28 U.S.C. 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]."). Therefore, the court finds that this action should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g). This case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DATED this 28th day of September, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA